

NOTICES OF EMERGENCY RULEMAKING

Under the Administrative Procedure Act, an agency may determine that adoption, amendment, or repeal of a rule is necessary for immediate preservation of the public health, safety, or welfare and the notice and public participation requirements are impracticable. Under this determination, the agency may adopt the rule as an emergency and submit it to the Attorney General for review. The Attorney General approves the rule and then files it with the Secretary of State. The rule remains in effect for 180 days. An emergency rule may be renewed for one 180-day period if the requirements of A.R.S. § 41-1026 are met. If the emergency rule is not renewed or the rule is not permanently adopted by the end of the 180-day period, the emergency rule expires and the text of the rule returns to its former language, if any.

NOTICE OF EMERGENCY RULEMAKING

TITLE 9. HEALTH SERVICES

CHAPTER 14. DEPARTMENT OF HEALTH SERVICES LABORATORIES

[R05-197]

PREAMBLE

1. Sections Affected

R9-14-403
R9-14-404
Exhibit 1
Exhibit 2
Exhibit 2A
Exhibit 3
Exhibit 3A

Rulemaking Action

Amend
Amend
New Exhibit
New Exhibit
New Exhibit
New Exhibit
New Exhibit

2. The statutory authority for the rulemaking, including both the authorizing statute (general) and the statutes the rules are implementing (specific):

Authorizing statutes: A.R.S. §§ 41-1026 and 41-1713(A)(9)
Implementing statutes: A.R.S. §§ 28-1323, 28-1324, and 28-1325

3. The effective date of the rules:

May 31, 2005

The Arizona Department of Public Safety (DPS) requests an immediate effective date. The rule shall be effective immediately on filing in the Office of the Secretary of State. An immediate effective date is required to preserve the public safety. Driving Under the Influence (DUI) of alcohol, with its related loss of life, serious bodily injury, and property damage, must be deterred through aggressive traffic enforcement. Therefore, the Department of Health Services approved the Intoxilyzer 8000 for use in Arizona as a modern, effective breath-testing device, but this approval expires June 9, 2005. Currently, 5,000 DUI alcohol tests have been performed on the Intoxilyzer 8000, and loss of approval would jeopardize numerous DUI convictions, leaving the Arizona law enforcement community without one of its most effective tools for removing drunk drivers from the roadways. As a result, an effective date preceding June 9, 2005, is necessary.

4. Is this rulemaking a renewal of a previous emergency rulemaking?

If yes, the Register citation to previous notices of emergency rulemaking:

This is not a renewal of a previous emergency rulemaking.

5. The name and address of agency personnel with whom persons may communicate regarding the rule:

Name: Michelle A. Spirk
Toxicology Technical Supervisor, Scientific Analysis Bureau

Address: Arizona Department of Public Safety
Central Regional Crime Laboratory
2102 W. Encanto Blvd.
Phoenix, AZ 85009

Phone: (602) 223-2792

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Fax: (602) 223-2924
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Name: Todd A. Griffith
Superintendent, Scientific Analysis Bureau

Address: Arizona Department of Public Safety
Central Regional Crime Laboratory
2102 W. Encanto Blvd.
Phoenix, AZ 85009

Phone: (602) 223-2494

Fax: (602) 223-2924

E-mail: TGriffith@azdps.gov

6. An explanation of the rule, including the agency's reasons for initiating the rule:

The Director of DPS was recently granted the authority pursuant to A.R.S. §§ 28-1324 and 41-1713 to adopt rules prescribing methods and procedures for the administration of breath tests to determine alcohol concentration, including the approval of quantitative breath-testing devices and procedures for ensuring the accuracy of results obtained from approved breath-testing devices. The purpose of the statute is to ensure the accuracy and reliability of breath-testing devices and to facilitate the apprehension and prosecution of drivers who operate motor vehicles under the influence of alcohol; A.A.C. R9-14-403 and R9-14-404 implement the statute by providing devices, methods, and procedures approved by the DPS to detect the amount of alcohol in the breath of an individual. On June 9, 2003, while under the authority of the Department of Health Services (DHS), the DHS Director pursuant to A.A.C. R9-14-403(K) approved the Intoxilyzer 8000 as a quantitative alcohol breath-testing device and approved a standard operational procedure, two standard calibration check procedures, and two standard quality assurance procedures for its operation. The approval of this device expires on June 9, 2005. The purpose of this emergency rulemaking is to allow Arizona law enforcement and prosecutorial agencies to continue the use of the Intoxilyzer 8000 and related checklists. The continual use is necessary to enforce Arizona's driving under the influence (DUI) statutes. This continuation is accomplished by adding the Intoxilyzer 8000 and the standard operational procedure, calibration check procedures, and standard quality assurance procedures to the existing alcohol rules, R9-14-403 and R9-14-404.

Part of the reason for transferring the alcohol rules to DPS is the great familiarity that DPS has with the Criminal Justice System and complex arena of DUI enforcement and prosecution. Following the transfer, DPS began to discuss and plan for the next alcohol rulemaking process. However, as a new regulatory agency, we determined that the best course of action was to move forward cautiously and with full consideration of all participant interests. DPS was also responsible for the challenging task of administering the existing rules that now included the processing of some 6,000 Intoxilyzer 8000 Operator and Quality Assurance Specialist permits, on a newly developed magnetic card, and mounting two highly successful statewide Blood Alcohol Analyst proficiency test challenges. Because of these issues, DPS has begun the procedure for emergency rulemaking as outlined in A.A.C. R1-1-701, and is in compliance with those requirements for filing the Notice of Emergency Rulemaking.

7. A showing of good cause why the rule is necessary to promote a statewide interest if the rule will diminish a previous grant of authority of a political subdivision of this state:

Not applicable

8. The summary of the economic, small business, and consumer impact:

The approval of this rule would not have an economic, small business, or consumer impact. However, the economic impact of not approving this emergency rule will be substantial. The Intoxilyzer 8000 has been utilized by law enforcement for approximately two years, and jurisdictions that currently use the Intoxilyzer 8000 would bear the costs involved in purchasing new instruments, training personnel on the new instruments, and preparing the new instruments for use. Failure to approve this emergency rule will also impact the public, who will be required to subsidize costs incurred by the jurisdictions.

9. Any other matters prescribed by statute that are applicable to the specific agency or to any specific rule or class of rules:

Not applicable

10. Incorporations by reference and their location in the rules:

DPS is not incorporating by reference any, all, or part of any code, standard, or rule.

11. An explanation of the situation justifying the rule's making as an emergency rule:

The statewide impact of failure to grant this emergency rulemaking will significantly affect public health, safety, and welfare. The statewide impact includes: (1) the inability to enforce Arizona DUI laws and deter impaired drivers; (2) placing 5,000 plus DUI cases in jeopardy; (3) leaving many Arizona law enforcement agencies with no approved

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alcohol breath-testing device; (4) creating a several-month window with no DUI enforcement as agencies purchase new breath test instruments and 6,000 officers are retrained to operate this device; (5) numerous legal challenges regarding past and future use of the 8000; and (6) false and misguided perceptions that the Intoxilyzer 8000 is an unreliable instrument.

The Intoxilyzer 8000 is the next-generation breath-testing device selected for Arizona statewide DUI enforcement. After an exhaustive study, it was determined that the Intoxilyzer 8000 is the best instrument to meet Arizona's needs and provide quick, reliable, accurate alcohol concentration results. Therefore, the 8000 was approved by the Department of Health Services, and the Department of Public Safety, in conjunction with the Governor's Office of Highway Safety, has implemented a three-year replacement program to convert Arizona to the modern Intoxilyzer 8000. There are more than 100 of these devices now in the field throughout the state with over 6,000 Arizona trained Operators and Quality Assurance Specialists. The 6,000 Operators and Quality Assurance Specialists include primarily law enforcement, military, and limited private sector individuals. Approximately 5,000 DUI cases have been performed on this device. Some cases have been adjudicated, and some are still pending final adjudication. The older Intoxilyzer 5000 device is being phased out, and it has become difficult to obtain parts for repair and maintenance; the 8000 model is the designated replacement device. The Intoxilyzer 8000 also offers the highly desirable mobile or point-of-contact DUI testing in which the DUI suspect can have his alcohol concentration checked immediately instead of being transported to an instrument located at a substation, which may be 30 minutes away to two hours away in rural Arizona. The 8000 model is also utilized in juvenile alcohol enforcement, Department of Correction's alcohol enforcement, Game and Fish operating under the influence related to water craft enforcement, commercial drivers license alcohol enforcement, and Drug Recognition Expert alcohol rule outs.

If the emergency rule is not approved, Arizona Governor's Office of Highway Safety (AZ GOHS) grants will be affected. DPS is currently involved in an ongoing AZ GOHS grant to replace the entire statewide fleet of breath test instruments with the Intoxilyzer 8000 device. Many small Arizona police agencies have also been provided individual grants from AZ GOHS to purchase the Intoxilyzer 8000. Clearly, any lapse in approval would bring the Intoxilyzer 8000 Program to an end, thus jeopardizing DUI enforcement and prosecution throughout the state of Arizona.

This breath test device is essential to enforcing DUI laws and deterring impaired driving. Continuation of the use of the 8000 Model in Arizona through this emergency rulemaking is essential to public safety, health, and welfare in Arizona to save lives, lessen bodily injury, and reduce property damage from DUI drivers.

12. The date of the Attorney General's approval of the emergency rule:

The Attorney General is requested to complete approval and file this emergency rulemaking with the Secretary of State prior to June 9, 2005.

13. The full text of the rules follows:

TITLE 9. HEALTH SERVICES

**CHAPTER 14. DEPARTMENT OF HEALTH SERVICES
LABORATORIES**

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

Section

R9-14-403. Breath-testing and Collection Devices

R9-14-404. Testing Procedures

Exhibit 1. Standard Operational Procedure – Intoxilyzer Model 8000 – Duplicate Test

Exhibit 2. Standard Quality Assurance Procedures – Intoxilyzer Model 8000 – Standard Calibration Check Procedure

Exhibit 2A. Standard Quality Assurance Procedures – Intoxilyzer Model 8000 – Standard Calibration Check Procedure

Exhibit 3. Standard Quality Assurance Procedures – Intoxilyzer Model 8000

Exhibit 3A. Standard Quality Assurance Procedures – Intoxilyzer Model 8000

ARTICLE 4. DETERMINATION OF ALCOHOL CONCENTRATION

R9-14-403. Breath-testing and Collection Devices

- A. No change
- B. No change
- C. No change
- D. No change

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- E. No change
 F. No change
 G. The following quantitative breath-testing and collection devices are approved by the Director:

Model	Manufacturer
Breathalyzer 900/900A	Smith and Wesson Co.
Alco-Sensor III	Intoximeters, Inc.
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with or without Beam Attenuator	
Intoxilyzer Models 4011A	CMI, Inc./Federal Signal
Modified and 4011AS Modified with Sample Preservation Modification with or without Beam Attenuator	
Intoxilyzer Model 5000	CMI, Inc./Federal Signal
Intoxilyzer Model 5000 with or without Vapor Recirculation and with or without Keyboard	CMI, Inc.
Intoximeter Model 3000	Intoximeters, Inc.
Mark IV GCI	Intoximeters, Inc.
GCI Field Collection Unit	Intoximeters, Inc.
PST-10 Silica Gel Tube (also known as SM-10 Silica Gel Tube)	Luckey Laboratories, Inc./ U.S. Alcohol Testing of America, Inc.
RBT IV (Alco Sensor IV with a RBT IV printer microprocessor)	Intoximeters, Inc.
Toxtrap Silica Gel Tube	Toxtrap, Inc./ Federal Signal
Intoxilyzer Model 5000EN	CMI, Inc.
<u>Intoxilyzer 8000</u>	<u>CMI, Inc.</u>

- H. No change
 I. No change
 J. No change
 K. No change

R9-14-404. Testing Procedures

- A. Law enforcement agencies or individuals acting independently of such agencies who conduct alcohol concentration determinations by means of breath-testing devices shall implement a quality assurance program conducted by a quality assurance specialist. This quality assurance program shall include:
1. Criteria for ensuring the proper operation of devices by testing device controls and indicators to ensure that they are functioning as required by the Department quality assurance procedures for the devices. The procedures shall be performed and recorded within 90 days of each other following the appropriate Department quality assurance procedure set forth in Exhibits F, H, J, M, Q, Q-EN, QQ, QQ-EN, T, V, ~~and Z~~, 3 and 3A or as approved by the Director according to R9-14-403(K).
 2. Calibration checks of breath-testing devices that shall be performed and recorded according to the requirements of the appropriate Department quality assurance procedure set forth in Exhibits F, J, L, P, P-EN, PP, PP-EN, S, V, ~~and Y~~, 2 and 2A or as approved by the Director according to R9-14-403(K).
 3. No change
 4. No change
 5. No change

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- 6. No change
- B.** Operator permit holders shall utilize the operator procedure approved by the Department for the device being operated in performing tests and collecting samples for the determination of alcohol concentration, as contained in Exhibits E, EE, G, I, II, K, KK, N, NN, O, OO, OOO, R, RR, U, UU, W, WW, WWW, WWW-EN, ~~and X~~, and 1 or as approved by the Director according to R9-14-403(K).
- C.** No change

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EXHIBIT 1

OPERATIONAL CHECKLIST

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD OPERATIONAL PROCEDURE

INTOXILYZER MODEL 8000

DUPLICATE TEST

AGENCY _____

NAME OF SUBJECT _____

DATE _____

INSTRUMENT SERIAL NO. _____

LOCATION OF TEST _____

OPERATOR _____

TEST RESULTS 0. _____ AC _____

TIME _____

0. _____

0. _____

Immediately preceding the administration of the tests, the subject underwent a 15-minute deprivation period from _____
to _____ by _____

() 1. Display reads "Push Button to Start". Ensure breath tube is warm to touch.

() 2. Push Start Test button

() 3. Follow automated instructions on instrument display

() 4. If test record reads "Successfully Completed Test Sequence" go to step 5

OR

If test record reads "Not a Successfully Completed Test Sequence", and subject will be tested again, remove test record and go to step 1

OR

If test record reads "Not a Successfully Completed Test Sequence", and subject will not be tested again, go to step 5

() 5. Remove test record.

Note: Duplicate tests shall be administered at intervals of not less than 5 minutes nor more than 10 minutes apart. Two consecutive tests shall agree within 0.020 alcohol concentration.

EXHIBIT 2

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES

INTOXILYZER MODEL 8000

STANDARD CALIBRATION CHECK PROCEDURE

AGENCY _____
DATE _____ TIME _____
INTOXILYZER SERIAL NO. _____ LOCATION _____
QA SPECIALIST _____
(print name)

- () 1. Ensure dry gas tank is attached to instrument and contains a known alcohol standard _____ AC.

OR

Pour a standard alcohol solution of known value, _____ AC, into a clean dry simulator and assemble the simulator. Ensure that a tight seal has been made. Turn on the simulator and allow temperature to reach 34°C ±0.2°C

- () 2. Intoxilyzer 8000 display reads "PUSH BUTTON TO START"
() 3. Go to the "Control Testing Menu". Select "D" for dry control test or "W" for wet control test. After selection is made press enter.
() 4. Air blank completed.
() 5. Calibration check completed. Test results 0, _____ AC.
() 6. Air blank completed.
() 7. Remove printed record. Attach the record to the completed checklist.

SIGNATURE: _____

EXHIBIT 2A

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES

INTOXILYZER MODEL 8000

STANDARD CALIBRATION CHECK PROCEDURE

1. a. Ensure dry gas tank is attached to instrument and contains a known alcohol standard.
OR
 - b. Pour a standard alcohol solution of known value into a clean dry simulator and assemble the simulator. Ensure that a tight seal has been made. Turn on the simulator and allow temperature to reach 34°C ±0.2°C
2. Intoxilyzer 8000 display reads "Push Button to Start"
3. Go to the "Control Testing Menu". Select "D" for dry control test or "W" for wet control test. After selection is made press enter.
4. Air blank completed.
5. Calibration check completed.
6. Air blank completed.

EXHIBIT 3

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES

INTOXILYZER MODEL 8000

STANDARD QUALITY ASSURANCE PROCEDURE

AGENCY _____
DATE _____ TIME _____
INTOXILYZER SERIAL NO. _____ LOCATION _____
QA SPECIALIST _____

(Print Name)

() 1. Display Reads "Push Button to Start"

DIAGNOSTIC TESTS

() 1. Clock time check.

() 2. Date check.

OPERATIONAL TESTS

() 1. Alcohol-free subject test result 0. _____ AC.

() 2. Error recognition logic system functioning.

Not a Successfully Completed Test Sequence printed

() 3. Proper sample recognition system.

Not a Successfully Completed Test Sequence printed

Deficient sample printed.

() 4. Calibration standard 0. _____ AC. Result 0. _____ AC.

Instrument is operating properly and accurately. YES _____ NO _____

Comments: _____

Signature _____

EXHIBIT 3A

THIS REPORT PREPARED PURSUANT TO DUTY IMPOSED BY A.A.C. R9-14-404(A)

ARIZONA DEPARTMENT OF HEALTH SERVICES

STANDARD QUALITY ASSURANCE PROCEDURES

INTOXILYZER MODEL 8000

STANDARD QUALITY ASSURANCE PROCEDURE

Display reads "Push Button to Start"

DIAGNOSTIC TESTS

1. Clock time check.
2. Date check.

OPERATIONAL TESTS

1. Alcohol-free subject test result.
2. Error recognition logic system functioning.
Not a Successfully Completed Test Sequence printed or recorded.
3. Proper sample recognition system.
Not a Successfully Completed Test Sequence printed or recorded.
Deficient sample printed or recorded
4. Known alcohol standard (Calibration Standard).

Instrument is operating properly and accurately. YES or NO